

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of the Fair Hearing Request of:

CLAIMANT,

vs.

WESTSIDE REGIONAL CENTER,

Service Agency.

OAH No. 2022080847

DECISION

Eric Sawyer, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter by videoconference on June 12 and August 28, 2023.

This matter was consolidated for hearing with a similar case involving claimant's younger sister, bearing OAH case number 2022080846. Pursuant to Welfare and Institutions Code section 4712.2, subdivision (b), each matter has a separate decision.

The record closed and the matter was submitted for decision at the conclusion of the hearing.

Claimant was represented by his mother, who was assisted by a Spanish language interpreter each hearing day. The names of claimant and his family members are omitted to protect their privacy and maintain confidentiality.

Ron Lopez, IDEA Specialist, represented Westside Regional Center (service agency).

ISSUES

1. Shall service agency increase claimant's respite hours from 42 to 60 hours per month?

2. Shall service agency fund claimant to receive adaptive skills training in his home and community?

EVIDENCE RELIED ON

In making this Decision, the ALJ relied on service agency's exhibits 1 through 14; claimant's exhibit A; as well as the testimony of Ron Lopez, claimant's mother, and Josefina Romo.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Service agency determines eligibility and provides funding for services and supports to persons with developmental disabilities under the Lanterman

Developmental Disabilities Services Act (Lanterman Act), among other entitlement programs. (Welf. & Inst. Code, § 4500 et seq.)

2. Claimant is an 18-year-old who is a service agency client and eligible for services under the Lanterman Act based on his diagnosis of Autism Spectrum Disorder. (Exs. 10, 11.)

3. In July 2022, claimant's mother requested for claimant 90 hours of extended school year (ESY)/childcare support for the school break during the summer of 2022; an increase in respite funding to 60 hours per month; and for adaptive skills training (AST) to be provided in the home and the community. (Ex. 3.)

4. By a Notice of Proposed Action dated July 27, 2022, service agency advised claimant's mother it had denied her requests. The stated reasons were that service agency's purchase of service (POS) committee had concluded ESY is available only when both parents work or attend school full time (claimant's parents did not); there was insufficient information to support increasing respite hours; and claimant's parents had not requested AST funding from their healthcare insurance. (Ex. 3.)

5. On August 11 and 26, 2022, claimant's mother submitted Fair Hearing Requests (FHRs), which appealed service agency's service denials. (Ex. 3.)

6. On September 21, 2022, the parties engaged in an Informal Meeting concerning claimant's FHRs. No resolution was reached. (Ex. 4.)

7. Official notice is taken from OAH's file of this matter that the hearing initially was scheduled for November 9, 2022, and that the hearing was continued to the following dates for the following reasons: December 9, 2022 (claimant's mother had a doctor's appointment); January 20, 2023 (claimant and her mother were ill);

March 6, 2023 (claimant's mother did not receive notice of the new hearing date); March 29 and April 17, 2023 (claimant's mother needed more time to prepare and also wanted to schedule a mediation); May 5, 2023 (service agency representative failed to appear at the hearing due to a death in his family); and June 12, 2023 (claimant's mother advised she had resolved both matters but later decided she could not sign a notice of resolution).

8. Official notice is taken that in her prior continuance requests, claimant's mother waived the time limit prescribed by the Lanterman Act for holding the hearing and for the ALJ to issue a decision in this case.

9. At the outset of the hearing, the ALJ determined that the request for ESY funding was moot since it involved a prior school year, and that issue was dismissed. Claimant's mother was advised that if she had any out-of-pocket expenses for childcare during that period, she could submit a request for reimbursement to the service agency, and submit a new FHR if such a request was denied. (See Legal Conclusion 15.)

Claimant's Relevant Background Information

10. Claimant lives at home with his parents, his brother, and his younger sister. His siblings also are clients of the service agency. (Exs. 10, 11.)

11. The record indicates claimant was a senior in high school as of July 2022. He did not receive special education services then because he was in mainstream classes. (Ex. 10.)

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12. In his most recent individual program plan (IPP), claimant is described as close to his father, but having no friends outside of his immediate family. Claimant is intelligent and strong, but is not able to play soccer as much as he would like due to asthma attacks. Claimant can become aggressive when he is upset, including with his family members. He prefers to be on his own. Claimant gets irritated with his little sister, who cries a lot. He also will throw things and slam the door to his room when he gets frustrated. (Exs. 10, 11.)

Claimant's Requests for Funding

RESPIRE

13. Claimant's mother reports the family has no extended circle of support to supervise her children; claimant's mother and father are the only adults available. Claimant's mother is not employed. While claimant's father works part time, he has a long commute and is gone from home many hours each day. (Testimony [Test.] of claimant's mother.)

14. As explained in more detail below, in July 2022 service agency agreed to provide funding for claimant to receive 28 hours per month of respite. That amount was later increased to the current amount of 42 hours per month. (Exs. 5, 6.)

15. The record does not establish the reason claimant's mother requested additional respite funding for claimant.

16. Claimant's mother prepared for the hearing a schedule showing claimant's care needs each hour of the week. (Ex. A.) The chart shows how the family integrates approximately 49 hours per week of In-Home Supportive Services (IHSS), claimant's attendance at school from 8:30 a.m. until 3:00 p.m., and the 42 hours per

month of respite the family already receives. The family generally uses respite for claimant on weekdays from 4:00 to 5:00 p.m. On weekends the respite is used in the morning and early afternoon. (Ex. A.)

17. Claimant's mother testified her son is about to participate in the Self-Determination Program (SDP). The centerpiece of the SDP is the annual budget created by the parties, in which the client has wide discretion in using funding in the budget for the various services and supports identified therein as he sees fit. (See, e.g., Welf. & Inst. Code, § 4685.8.) Claimant's mother testified claimant will be requesting a greater amount of respite hours than currently provided during the process of developing his budget in the SDP.

18. Claimant's mother testified she needs two hours per day away from claimant to achieve a true break from the constant demands and strain of caring for her children. Claimant's mother calculated her need for 60 hours per month of respite funding by multiplying two hours per day by 30 days per month.

AST

19. In 2022, claimant's mother requested AST for her son to help him with his independent and safety skills at home and in the community. (Ex. 4.)

20. When she requested the AST service in 2022, claimant's mother informed service agency that claimant exhibited behavioral problems. At that time, claimant did not receive behavioral services because the family was not satisfied with prior behavioral services provided to claimant. (Ex. 3.)

21. Claimant's mother testified her son will be pursuing funding for independent living skills services through the SDP.

RETROACTIVE FUNDING

22. At hearing, claimant's mother advised that, in light of claimant's upcoming participation in the SDP, she would like any funding granted in this case to take the form of compensatory services dating back to July 2022, when she first requested these services.

Service Agency's Determinations

RESPIRE

23. Service agency uses a Respite Needs Assessment Tool (RNAT) when considering how many hours per month of respite to fund for a family. The RNAT is a survey document in which a service agency employee assesses various factors, with the input of a client's parent or representative, including the client's age, daily living activities, mobility, communication, participation in a school or day program, medical needs, behavioral needs, caregiver situation, and safety/supervision needs. Points are given for each response. A grid at the end of the document correlates respite hours per month with point totals. The greater the number of points, the greater the respite hours. However, the maximum amount provided on the grid is 42 hours per month; any higher amount must be decided by the planning team. (Exs. 5, 6, 14.)

24. On July 14, 2022, the RNAT was completed with input from claimant's mother. Based on the results of the RNAT, service agency determined that 28 hours per month of respite for claimant would provide appropriate support for the family. (Exs. 5, 6.)

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25. On February 14, 2023, after claimant's mother submitted the FHR, claimant's need for respite support was reassessed, again using the RNAT. Claimant's mother provided input in that assessment. The results of her input showed elevated scores in the areas of behavioral needs, family/caregiver situation, and safety/supervision needs. The results of the RNAT indicated that 42 hours per month of respite were appropriate. (Ex. 14.) Service agency authorized that level of funding almost immediately. (Ex. 13.)

26. The family now receives funding for 42 hours per month of respite for claimant's younger sister involved in the consolidated case, in addition to claimant's funding. (Ex. 14, OAH case no. 2022080846.) It is assumed the family receives a similar amount of respite hours for claimant's brother.

27. Mr. Lopez testified that considering the other services provided to the family, such as IHSS, the current funding amount of 42 hours per month of respite is appropriate.

28. Service agency has POS guidelines (guidelines) for funding respite. (Ex. 8.) The guidelines define respite consistent with the Lanterman Act (see below). The guidelines require service agency to use the RNAT when assessing a family's respite needs. The guidelines also require service agency to consider generic sources of supervision, such as IHSS. The guidelines provide for funding an amount greater than indicated in the RNAT under the following circumstances:

[W]hen there are extenuating family circumstances that warrant consideration for additional respite such as, but not limited to, parent has left their employment in order to care for the child, additional medical condition of the client that

impacts the family, extreme/excessive behavioral challenges, recent event impacting the ability of the primary caregiver to meet the care and supervision needs of the client, client support needs not addressed with current resources (natural supports, generic resources, regional center funded resources), a demonstrated change in the client's level of care and supervision needs not previously discussed in the most recent IPP or Family Respite Needs Assessment.

(Ex. 8, p. A45.)

AST

29. Service Agency denied the request to fund AST because claimant's family had not indicated they had attempted to obtain generic sources of funding for it, such as through their healthcare insurance. (Ex. 3.)

30. Service agency also denied the request because claimant's mother has reported that claimant exhibits behavioral challenges which would make it difficult for him to access AST. Service agency believes behavioral services are a more appropriate service to address claimant's adaptive skills need, such as applied behavior analysis therapy. (Ex. 3.)

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LEGAL CONCLUSIONS

Jurisdiction and Burden of Proof

1. An administrative hearing to determine the rights and obligations of the parties is available under the Lanterman Act to appeal a contrary regional center decision. (Welf. & Inst. Code, §§ 4700-4716; an undesignated statutory reference is to the Welfare and Institutions Code.) Claimant's mother appealed service agency's denial of her request for an increase of respite funding and the initiation of AST funding, and therefore jurisdiction exists for this appeal. (Factual Findings 1-9.)

2. The standard of proof in this case is the preponderance of the evidence because no law or statute, including the Lanterman Act, requires otherwise. (Evid. Code, § 115.) This standard is met when the party bearing the burden of proof presents evidence that has more convincing force than that opposed to it. (*People ex rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

3. When one seeks government benefits or services, the burden of proof is on him. (See, e.g., *Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 [disability benefits].) In this case, claimant bears the burden of proving by a preponderance of the evidence that he is entitled to an increase in respite funding and the initiation of AST funding.

Applicable Provisions of the Lanterman Act

4. Respite services under the Lanterman Act are designed "to provide intermittent or regularly scheduled temporary relief from the care of a developmentally disabled family member." (§ 4690.2, subd. (a).)

5. Respite services are to be purchased by a regional center based upon the individual needs of a given consumer and his family. Respite services are designed to: assist family members in maintaining a client at home; provide for appropriate care and supervision to ensure the client's safety in the absence of family members; relieve family members from the constantly demanding responsibility of caring for a client; and attend to the client's basic self-help needs and other activities of daily living, including interaction, socialization, and continuation of usual daily routines, which would ordinarily be performed by a family member. (§ 4690.2, subd. (a)(1) - (a)(4).)

6. When purchasing services and supports, regional centers must ensure they conform to their purchase of service policies, as approved by the Department of Developmental Services (DDS) pursuant to section 4434, subdivision (b), as well as utilize generic services and supports when appropriate. (§ 4646.4, subd. (a).)

7. Pursuant to section 4690.2, subdivision (c), in conjunction with section 4629.5, subdivision (b), regional centers are encouraged to develop procedures and assessment tools to be used in determining the level of respite services needed by each consumer, and to publish the same on their Internet Websites.

8. The Lanterman Act provides for "daily living skills training," which is a term broad enough to cover AST services. (§ 4512, subd. (b).) No other definition or service requirement for AST is specified in the Lanterman Act, nor did service agency submit a DDS-approved POS policy or guideline concerning AST.

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Disposition

RESPIRE

9. Claimant's mother did not specify why she requested an increase of respite funding for claimant. Presumably it is related to the fact all her children are service agency clients. However, the provisions of the Lanterman Act cited above show a significant increase in respite funding must be demonstrated by objective analysis and consistent with DDS-approved policies.

10. Claimant's family already receives significant assistance in caregiving, such as funding for approximately 49 hours per week of IHSS and claimant being out of the house on school days. Claimant and his younger sister each receive the maximum amount of monthly respite authorized by the RNAT, and probably the same amount for claimant's brother. If the request for a respite increase is granted for claimant and his sister, claimant's mother would have between four to six hours per day of respite. That amount gives one pause.

11. Moreover, claimant's current respite funding was determined using an objective analysis contained in service agency's respite assessment tool. DDS encourages regional centers to use such tools in attempting to quantify these difficult decisions. The level of funding also conforms to service agency's respite guidelines. Put another way, claimant's mother failed to demonstrate her situation warrants an exceptional level of respite funding above the maximum amount already provided.

12. Based on the above, it cannot be concluded that claimant's evidence of the need for an increase in respite funding is more convincing than the evidence in opposition, and therefore claimant has failed to meet his burden of establishing that

he is entitled to the respite funding increase he requests. (Factual Findings 10-18, 23-28; Legal Conclusions 5-7, 9-11.)

AST

13. Claimant's mother failed to present evidence regarding claimant's need for AST. She also failed to address service agency's concerns that the family has not attempted to utilize generic funding resources, such as insurance, or that claimant's behavioral problems will prevent him from meaningfully accessing an AST program. Based on the above, it cannot be concluded that claimant's evidence of the need for the initiation of AST service funding is more convincing than the evidence in opposition, and therefore claimant has failed to meet his burden of establishing that he is entitled to the AST funding he requests. (Factual Findings 10-12, 19-21, 29-30; Legal Conclusions 6-8.)

RETROACTIVE FUNDING

14. At hearing, claimant's mother indicated claimant will be seeking prospective funding for respite and adaptive living skills through the SDP. She complained that claimant has needed these services for the past few years while this matter has been pending. Claimant's mother therefore requested retroactive relief in this case, essentially an award of compensatory services dating back to when she first requested this funding in July 2022.

15. As the undersigned explained on the record during the hearing, the Lanterman Act has no provision for compensatory services. In fact, there is not even a provision covering retroactive reimbursement. However, a hearing officer deciding a case under the Lanterman Act is empowered by statute to resolve "all issues concerning the rights of persons with developmental disabilities to receive services."

(§ 4706, subd. (a).) Thus, it has been held that, as a matter of equity, the Lanterman Act is broad enough to encompass the right to reimbursement of costs incurred by a family while awaiting resolution of a service dispute. But in this case, the record does not indicate the family has incurred such costs or requested reimbursement for them from service agency. Thus, the request for compensatory services or any other retroactive relief is denied.

16. Finally, as this case involves claimant's rights to services under the traditional Lanterman Act service provisions, nothing in this decision is intended to affect any rights claimant has to the same or similar services under the SDP.

ORDER

Service agency shall not increase claimant's respite hours from 42 to 60 hours per month.

Service agency shall not provide funding for claimant to receive adaptive skills training in his home and community.

DATE:

ERIC SAWYER

Administrative Law Judge

Office of Administrative Hearings

NOTICE

This is the final administrative decision. Each party is bound by this decision. Either party may request a reconsideration pursuant to subdivision (b) of Welfare and Institutions Code section 4713 within 15 days of receiving the decision, or appeal the decision to a court of competent jurisdiction within 180 days of receiving the final decision.